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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,677	07/15/2003	Jessica Elizabeth LeMay	460.2242USQ	7057

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EXAMINER

STEPHENS, JACQUELINE F

ART UNIT	PAPER NUMBER
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3761

MAIL DATE	DELIVERY MODE
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06/01/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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Office Action Summary

Application No.

10/619,677

Applicant(s)

LEMAY ET AL.

Examiner

Jacqueline F. Stephens

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 2/23/07.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 22-24, 26 and 27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 22-24, 26, and 27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 2/23/07 have been fully considered but they are not persuasive. Applicant repeats the argument that Koch does not disclose the claimed taper ratio or suggest a taper ratio of a main section. Any point of the insertion end of the tampon is the insertion tip section, the entire portion 16 is the main body, which includes areas 2 and 18. Therefore, the main body has a first taper towards the insertion end and a second taper towards the plunger end. Applicant argues with respect to the claimed ratios and dimensions, that Koch does not disclose that the Figure is not to scale and may not be relied on to show particular sizes if the specification is completely silent on the issue. However, Koch is not silent on the issue as Koch discloses a size and proportions in the Figure. Koch just does not specify the dimensions. The examiner has not relied on Koch for a specific teaching of size, but rather a general teaching of shape and size. The examiner maintains that, Koch discloses a tampon inserter having a curved insertion tip similar in structure to the curved insertion tip of the present invention, which is shown in Koch in Figure 1. The prior art invention is used in the same manner as the present invention; therefore the size of the articles would be similar. The claimed taper ratio would be obvious by optimizing the curvature of the inserter. Moreover, discovering optimum values only involves routine skill in the art.

Applicant argues that the finger grip is separate from the inserter barrel of Koch, and thus, the reverse taper and finger grip sections are also separate from the barrel. However, as previously indicated, the examiner considers the portions generally designated as 14 and 15 (finger grip portions) to be part of the barrel because the only other portion of the tampon is the plunger. While the main body of the barrel is generally cylindrical, the plunger-receiving end of the barrel has a reverse taper as claimed. Additionally, applicant's drawings particularly Figure 1, is substantially identical to the Figure of Koch.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 22-24, 26, and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koch et al. Des. 250,663.

As to claims 22 and 26, Koch discloses a tampon applicator comprising: an insertion tip **1** having a plurality of pleats **17**; a main section **16**; and a finger grip having a first region **4**, a gripping region **15**, and a second region **14**, wherein the first region **4** intersects with main section **16** at a first plain having a first outer dimension A. The gripping region **15** intersects the first region and has a second outer dimension B. The second region **8** intersects the gripping region **15** and has a third outer dimension C. The first outer dimension being larger than the second outer dimension and the third outer dimension being larger than the second outer dimension.

(See below figure in Koch where examiner has designated reference numerals 1-18 to depict various elements of the Koch invention) finger grip section **15** on the plunger-receiving end and a reverse taper section **14** adjacent the finger grip section in the direction of the insertion end **1** of the barrel.

Koch discloses the present invention substantially as claimed except Koch does not disclose a taper ratio. However, Koch discloses a tampon inserter having a curved insertion tip similar in structure to the curved insertion tip of the present invention. Therefore, it is reasonable for the examiner to conclude the curved insertion tip of Koch would not constitute a severe curvature and accordingly, high diameter to length ratio, and thus enabling easy insertion of the tampon. In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232

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(1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

As to claim 23, the maximum outer dimension is located closer to the finger grip 15 than to the insertion tip 1.

As to claim 24, the third outer dimension C is equal to the first outer dimension A.

As to claim 27 Koch discloses the present invention substantially as claimed except Koch does not disclose the petal length-to-width ratio. However, Koch discloses a tampon inserter having an insertion end sized to enable the plunger to expel the pledget. In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Conclusion

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F. Stephens whose telephone number is (571) 272-4937. The examiner can normally be reached on Monday-Friday 9:00-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Jacqueline F Stephens
Primary Examiner
Art Unit 3761

May 24, 2007